

No. 83-363

Office-Supreme Court, U.S.

FILED

SEP 28 1983

ALEXANDER L. STEVANS,
CLERK

In The
Supreme Court of the United States
October Term, 1983

STATE OF CONNECTICUT,

Petitioner,

vs.

CHARLES F. UBALDI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Supreme Court of the United States lack jurisdiction to decide this case since the Connecticut Supreme Court based its decision on adequate and independent state grounds?

2. Whether this Court may hear Petitioner's claim that the state court decision needlessly punishes society, in violation of the Constitution of the United States, when that issue has never been presented to the lower court or preserved for review by this Court?

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**ON PETITION FOR A WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Charles Ubaldi, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Supreme Court of the State of Connecticut.

PROCEEDINGS BELOW

The defendant brought an appeal to the Connecticut Supreme Court based on the denial of two motions for a mistrial. The Connecticut Supreme Court reversed the criminal conviction and ordered a new trial. The opinion of the Connecticut Supreme Court appears as Appendix A in the Petition for Writ of Certiorari.

STATEMENT CONCERNING JURISDICTION

For the reasons discussed at length, *Infra*, this Court lacks jurisdiction under 28 U. S. C. § 1257(3) to consider those questions presented by the Petitioner since the Supreme Court of the State of Connecticut rendered its decision based on adequate and independent state grounds, and since Petitioner's question (2) was never raised, preserved, or passed upon in the courts below it has not been preserved for review by this Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondent denies that this case involves the denial of a right protected by the Constitution of the United States.

STATEMENT OF THE CASE**Facts:**

At trial the appellant testified in his own behalf and was cross-examined by the assistant state's attorney. During the course of this cross-examination (which was apparently based partially on written records of financial transactions concerning the appellant's trustee account, client's fund), the following exchange took place:

"Q. And there is a third marking here, Nick Jamele?

A. Yes, sir.

Q. He is your bookie, isn't he, Mr. Ubaldi?

MR. MOYNAHAN: Oh boy, objection. I think the jury ought to be excused.

THE COURT: If you want to address something to me I think you ought to stand up.

MR. MOYNAHAN: I certainly will. That is, I have something to address to the Court.

THE COURT: Why don't you take your break, ladies and gentlemen.

(Jury leaves courtroom).

(In the absence of the jury).

MR. MOYNAHAN: I move for a mistrial, Your Honor. I am sorry, Your Honor, that I didn't stand up. I am sorry for acting the way I did. I apologize to the Court for that. But that question completely floored me. I think it is so clearly out of order. I really can't believe that Mr. Ward asked it. There is no background, no nothing for it. It can only be designed to inflame and prejudice the jury against Mr. Ubaldi. I very strongly urge the Court to grant my motion for a mistrial.

THE COURT: Read that back to me.

(Question read by the reporter).

THE COURT: We will take a recess and I will speak to the attorneys in chambers.

(Court recessed).

(Court resumed).

THE COURT: I am not going to declare a mistrial. All right, bring in the jury and do you want to resume the stand, please.

MR MOYNAHAN: May I have an exception?

THE COURT: Sure.

MR. WARD: Is there an objection to my question, Your Honor?

THE COURT: I don't know if he objects to the question.

MR. WARD: I just heard one oh boy.

MR. MOYNAHAN: I then objected.

THE COURT: I will sustain the objection to the question. You need not answer the question.

MR. MOYNAHAN: Would the Court give the jury any instructions?

THE COURT: Oh sure. All right, ladies and gentlemen, we are going forward with the trial. Mr. Ubaldi's attorney has objected to the question and he need not answer it and I would urge you to disregard the question itself. Pay no heed to it. It is not relevant. It is not significant in the case. It is to play no part in your deliberations.

All right, sir."

While the motion by appellant's counsel for a mistrial was denied by the court, the court in chambers instructed the assistant state's attorney that "that was an area that should be stayed away from if there is no evidence for it" (T15-16).

The court instructed the jury at the request of appellant's counsel that it should "disregard the question itself. Pay no heed to it" (T16).

Further examination was conducted by the assistant state's attorney with respect to the reason why the money involved was paid to Jamele and the appellant stated that the figure was paid to compensate Jamele for his work as a mason contractor on the appellant's home (T17, 18).

The State attempted to rebut the testimony of the appellant that the sums paid to Jamele were for work performed on his house. Jamele was subpoenaed by the State during the course of the trial and on the advice of counsel exercised his fifth amendment privilege (T67-79). The exercise of the privilege was sustained by the court (T78).

During the course of the State's closing argument, and after the exercise of Jamele's privilege had been sustained, the assistant state's attorney stated:

"MR. WARD: Where is Nick Jamele? Where is the man that he paid six thousand dollars to?

THE COURT: Please let there be no whispering in the courtroom.

MR. MOYNAHAN: Objection, Your Honor, May I approach the bench?

THE COURT: Yes.

I take it counselor you don't intend to pursue it more than you have already.

MR. WARD: No, Your Honor.

Where was John Bedell? Why didn't he come forward and testify?

MR. MOYNAHAN: Same objection, Your Honor?

MR. WARD: May I continue, Your Honor?

THE COURT: Yes.

(T481, 6/27/78).

At the time of the remarks the Court did not give the jury a curative instruction nor strike the remarks from the record.

At the close of argument and before the charge, counsel for the appellant moved for a mistrial based on the use by the State of the fact that the appellant had failed to call Jamele as a witness despite the ruling by the court that sustained Jamele's exercise of the fifth amendment privilege (T1-4). The court reserved decision and ultimately denied the motion for a mistrial (T105) and a subsequent motion to set aside the verdict based on the same grounds.

The substance of the court's charge to the jury did not include any curative instructions concerning the assistant state's attorney's remarks about the failure of the appellant to call witnesses.

REASONS WHY WRIT SHOULD BE DENIED

ARGUMENT

I.

This Court lacks jurisdiction to review the Connecticut Supreme Court ruling since the state court based its decision on an adequate and independent state ground.

In the Petition for a Writ of Certiorari, the Petitioner asserts that the Supreme Court of the State of Connecti-

cut has erred in that: (1) it failed to apply the doctrine of harmless error to this prosecutorial misconduct case, and (2) it misinterpreted and misapplied principles enunciated by the Court in *Smith v. Phillips*, 455 U.S. 209 (1982) and *United States v. Hastings*, — U.S. —, 103 S. Ct. 1978, 76 L. Ed. 2d 104 (1983). For these reasons the Petitioner requests this Court to review the decision of the state court.

The case at issue, *State v. Ubaldi*, 190 Conn. 559, — A. 2d —, was decided on July 5, 1983. One day subsequent to *Ubaldi* this Court rendered its decision in *Michigan v. Long*, — U.S. —, 103 S. Ct. 3469, — L. Ed. 2d — (1983) which set forth and discussed at length, the criteria for finding “adequate and independent state grounds”.

In *Michigan v. Long*, supra, this Court clearly enunciated that “Respect for the independence of state courts as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court’s refusal to decide cases where there is an adequate and independent state ground.” 103 S. Ct. at 3471.

Upon reading the decision rendered by the state court it is clear that the state court relied exclusively on its inherent power to defend its dignity and authority through its supervisory powers (190 Conn. 559 at 570, Petitioner’s Appendix A, p. 12a). The state court explicitly rejected the petitioner’s argument that a due process analysis be applied to the closing remarks intentionally made by the prosecutor in disregard for the trial court’s ruling, stating: “We decline, however, the state’s invitation to apply *Daniels* or the standard due process mechanistically to a case involving intentional prosecutorial misconduct.” (190 Conn. 559 at 556, Petitioner’s Appendix A, p. 8a).

The state court further found that "the Prosecutor's argument to the jury was improper both because the inference sought was clearly impermissible and because it demonstrated a complete disregard for the tribunal's rulings." (Petitioner's Appendix A, p. 9a).

Further, the state court expressed its inability to find applicable state case law, and only turned to the federal case law of *Smith v. Phillips*, supra, and *U. S. v. Hastings*, supra, to review what course of action other tribunals have taken (keeping in mind the fact that the court rejected the due process analysis for the case at issue). It should be noted that the state court also cited decisions from other states such as Iowa, New York, Michigan, New Jersey, New Mexico and Pennsylvania. Should the mention and discussion of other state decisions imply that the Connecticut court was of the view that these cases were binding? The mere mention and/or discussion of federal cases does not, in and of itself, imply that the state court made its decision because the federal law required it to do so. The state court's decision at issue can easily be distinguished from *Michigan v. Long*, supra, where this court granted the petition for review because the lower court relied exclusively on its understanding of federal cases.

The Petitioner argues that the facts of this case are "strikingly similar to those of *United States v. Hastings*", supra. This Court, in *Hastings*, reviewed the federal courts' supervisory powers to formulate procedural rules not specifically required by the **Constitution** or the **Congress**. In the case at issue there is a clear distinction. The State Court applied state supervisory powers and

although it used *Hastings* for its application of a test balancing other interests in directing a reversal, the state court did not apply the standard applied to the implementation of federal supervisory powers.

Additionally, in *Smith v. Phillips*, this Court granted certiorari to consider important questions of federal constitutional law raised in relation to federal habeas proceedings raised. Again, the state court in the case at hand, applied state law to state proceedings, this application certainly based within the sovereign powers of the state.

The Connecticut state court's language makes clear the fact that its decision is based on its interest in preserving the dignity and authority in the administration of justice. "We have not previously addressed the issue as to what extent deliberate prosecutorial misconduct during trial which violates express trial court rulings, unchallenged by the state on appeal, may serve as a basis for vacating a judgment of conviction. We have long held that a court has inherent power to defend its dignity and authority." (Petitioner's Appendix A, p. 11a).

Finally, if this Court does not allow the state court to enforce its own trial court's rulings the ultimate implication is that a state's attorney may totally disregard those rulings and the judiciary will be totally unable to defend the integrity of the judicial system.

II.

Petitioner's claim that the state court's decision needlessly punishes society and deprives the people of the government rights guaranteed by

the United States Constitution and has not been preserved for review by the Court.

As discussed *supra*, the Petitioner's position upon appeal to the Connecticut Supreme Court was that the state court could only reverse the trial court if the proceedings below could be deemed to have deprived the defendant of his constitutional right to a fair trial (Petitioner's Appendix, p. 9a). In a desperate attempt to seek review in this Court Petitioner now claims that a reversal of a criminal conviction needlessly punishes society and deprives the people of the government rights guaranteed them by Article IV, Section 4 of the United States Constitution.

This claim was never presented to the Supreme Court of Connecticut and therefore that Court never had an opportunity to pass on this claim which Petitioner has now raised in this Court for the first time. Consequently, as this Court has repeatedly explained, there is no federal jurisdiction to consider this claim.

It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell*, Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions before the *Crowell* opinion, *Miller v. Nicholls*, 4 Wheat. 311, 315 (1819), and since

Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). This jurisdictional rule is required by 28 U.S.C. § 1257 (3) (1976) and is supported by policy considerations and reasons of practicality alike. *Webb v. Webb*, 451 U.S. 493, 499-501 (1981). Since the federal question presented has never been raised, preserved, or passed upon in the state courts below, it should not and cannot be considered here.

○

CONCLUSION

Since the Connecticut Supreme Court rendered its decision based on independent and adequate state grounds necessary for preserving the integrity of that tribunal, the result should not and cannot be reviewed by the Court. For this reason, the respondent respectfully requests this Court to deny the Petitioner's Writ of Certiorari to review the decision of the Connecticut Supreme Court.

Respectfully submitted,

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